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Supreme Court, U.S.
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No. 00-8452

In The

Supreme Court of the United States

DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Virginia

THE RESPONDENT'S MOTION TO DISMISS WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

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THE RESPONDENT'S MOTION TO DISMISS WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

The Commonwealth of Virginia, by counsel, moves the Court to dismiss the writ of certiorari as improvidently granted for the following reasons:

1. On September 25, 2001, this Court granted Daryl Atkins' petition for a writ of certiorari on three questions presented. The first two questions – concerning alleged evidentiary errors occurring in the penalty phase of Atkins' trial – were raised in Atkins' petition for writ of certiorari. The third question – whether the Eighth Amendment prohibits the imposition of the death penalty on the mentally retarded – was raised for the first time in a "Supplement to Petition for Writ of Certiorari" filed two months after Atkins' petition for a writ of certiorari was due under this Court's rules, and only after this Court had granted certiorari in *McCarver v. North Carolina*, 121 S.Ct. 1401 (2001). On October 1, 2001, this Court issued an amended order limiting the grant of certiorari to the third question: whether execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment.

2. Atkins never raised the Eighth Amendment challenge in any state court. He never alleged in the trial court that the Constitution forbade the death penalty because of his alleged mental retardation. He argued to the jury, as was his right under Virginia Code § 19.2-264.4(B)(vi) and *Penry v. Lynaugh*, 492 U.S. 302 (1989), that his alleged mental retardation mitigated against a death sentence, but he made no motion or argument before, during or after his trial or sentencing that his alleged mental retardation prohibited imposition of the death penalty, much less that the Eighth Amendment forbade the death penalty. Pursuant to Rule 5:22 of the Rules of the Supreme Court of Virginia, Atkins was required to file in the Supreme Court of Virginia "assignments of error upon which he intend[ed] to rely for reversal of his conviction." Atkins, however, listed

no federal issue among his assignments of error. He did not argue the point in his brief. *See Beck v. Washington*, 369 U.S. 541, 553 (1962) (noting that jurisdiction is not proper where error is not assigned to the issue and the matter is not briefed in the state court).[1] In the Supreme Court of Virginia, Atkins argued only that his sentence was disproportionate to other Virginia cases under Virginia Code § 17.1-313 because he was "unable to find a case in Virginia in which an individual with an IQ of 59 has been sentenced to death." (*See* Atkins' direct appeal brief at 11). Atkins made no argument whatsoever in the Supreme Court of Virginia that the Eighth Amendment prohibited imposition of the death penalty on the mentally retarded.

3. The Supreme Court of Virginia, moreover, did not decide any federal issue regarding mental retardation, and certainly not whether the Eighth Amendment prohibits imposition of the death penalty on the mentally retarded. *See Atkins v. Commonwealth*, 534 S.E.2d 312, 318 (Va. 2000) (finding that Atkins argued under § 17.1-313(C) that his sentence was disproportionate to other Virginia cases because his IQ allegedly was lower than any other Virginia death row inmate); *id.* at 320 (holding that, "as part of our proportionality review," the Court must consider all the evidence regarding Atkins' mental functioning); *id.* at 321 (concluding under § 17.1-313(C) that "we cannot say that Atkins' sentence of death is excessive or disproportionate to sentences generally imposed in this Commonwealth for capital murders comparable to Atkins' murder of Nesbitt.").

4. Indeed, Justice Hassell's dissenting opinion below makes expressly clear that the Court was ***not*** deciding any federal issue:

> I recognize that the United States Supreme Court has held that the imposition of the death penalty upon mentally retarded criminal defendants does not violate the Eighth Amendment to the United States Constitution. *See Penry v. Lynaugh*, 492 U.S. 302, 340 (1989). However, ***the issue in this appeal is not whether the imposition of capital punishment upon a mentally retarded defendant violates the federal Constitution.*** Rather, the issue in this appeal is whether under Code § 17.1-313 the imposition of the sentence of death is excessive or disproportionate to the penalty imposed in similar crimes, considering both the crime and the defendant.

Atkins, 534 S.E.2d at 324 (emphasis added). The entire record below, including the brief filed by Atkins and the lower court's full opinion, makes clear that the issue the Supreme Court of Virginia was asked to decide – whether a death sentence in Atkins' case was disproportionate to sentences in other similar Virginia cases – is fundamentally different from the issue of whether the Eighth Amendment categorically prohibits a death penalty on the mentally retarded. *See Hill v. California*, 401 U.S. 797, 805 (1971) (a federal claim cannot be considered by the Court unless it has been either raised in the state court or considered and resolved by the state court.) Significantly, the state law-based nature of Atkins' claim was confirmed when, on rehearing, Atkins urged the Supreme Court of Virginia to "conduct a proper proportionality review" which "accurate[ly] assess[es] the evidence [of mental retardation] in this case." (*See* Atkins' petition for rehearing at 5-6).

5. Atkins' passing reference to *Penry* – made in the midst of his statutory argument that his death sentence was disproportionate to other Virginia cases – was insufficient to alert the Supreme Court of Virginia that it was presented with an Eighth Amendment claim. *See Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 550 n.9 (1987) (a mention of "a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim."). In fact, ***Atkins conceded on direct appeal that execution of the***

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[1] Atkins filed only an opening brief below. He did not file any motions or a reply brief.

mentally retarded was constitutional, and thus implicitly conceded that he had no constitutional complaint. (*See* Atkins' direct appeal brief at 11: "[T]he 8th Amendment's prohibition against cruel and unusual punishment does not categorically prohibit the imposition of the death penalty upon Mr. Atkins because he is mentally retarded".).

6. The single paragraph in the majority's opinion below mentioning *Penry* likewise is not any indication that the court decided any federal issue. The Supreme Court of Virginia stated clearly what the issue was before it – proportionality under § 17.1-313(C) – and then, after recounting the conflicting evidence in Atkins' case regarding retardation, merely restated what the parties had agreed was the holding in *Penry*. *Atkins*, 534 S.E.2d at 319-320. The court merely was making clear that, "[i]n Virginia," unlike in Texas, juries are entitled to consider mental retardation as mitigation evidence. The court's opinion cannot be read as holding that the federal constitutional claim at issue in *Penry* was dispositive of, or even related to, the state law proportionality issue in Atkins' case. Simply put, the Supreme Court of Virginia resolved no federal issue at all; neither was its decision dependent upon federal law.

7. Absent strict adherence to the jurisdictional requirement that the federal question properly be raised in the state court, the important policy considerations underlying the requirement are rendered meaningless. *See Cardinale v. Louisiana*, 394 U.S. 437 (1969) (noting three policy considerations underlying the jurisdictional requirement). First, as noted in *Cardinale*, Atkins' failure to raise the Eighth Amendment claim below deprived the Supreme Court of Virginia of the first opportunity to consider his belated constitutional challenge. This Court has made clear that "it would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Guy E. Adams v. Charlie Frank Robertson, et al.*, 520 U.S. 83, 86 (1997) (dismissing certiorari as improvidently granted because issue not presented to or decided

by Alabama Supreme Court). Second, absent adherence to the jurisdictional requirement, lower courts are not given any opportunity to decide the issue on an adequate and independent state law ground.[2] Finally, adherence to the jurisdictional requirement that the issue properly be raised in the state court insures that the record in the case is "compiled with the [certiorari] question in mind." *Cardinale*, 394 U.S. at 439. In Atkins' case, the record is devoid of any finding by any court that Atkins even is mentally retarded. To the contrary, in conjunction with Atkins' request for various mitigation instructions, the trial court found that Atkins' mental retardation was "legitimately in dispute factually." (*See* Joint Appendix filed in the Supreme Court of Virginia at 777.) And, when the Supreme Court of Virginia conducted its statutorily required proportionality review under Virginia Code § 17.1-313, it discussed the conflicting evidence of Atkins' mental retardation and noted the "sharp disagreement" between the experts at trial about whether Atkins even was mentally retarded. *See Atkins*, 534 S.E.2d at 319-321. The record here is bereft of material upon which this Court could make any principled analysis of the Eighth Amendment issue, a circumstance flowing directly from Atkins' own failure to raise or argue the issue below.

8. The Eighth Amendment question was not presented in the state court with "fair precision and in due time." *Robertson*, 520 U.S. at 88. Neither was it decided below. *Id*. This Court should, as it did in *Robertson*, dismiss the writ of certiorari as improvidently granted.

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[2] In fact, had Atkins assigned the Eighth Amendment claim as an error and argued it below, there is no doubt that the Supreme Court of Virginia would have applied its contemporaneous objection rule, Rule 5:25, to bar consideration of the claim because Atkins ***never raised it in the trial court***.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
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